Supreme Court, U.S.
FILED

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NO.

In The

Supreme Court of the United States

October Term, 1995

ELOISE MCGEE,
Petitioner,

VERSUS

HOLMES COUNTY, MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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December 19, 1994

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QUESTIONS PRESENTED

1. Whether a local government may be held liable for judicial policy decision of its judge in an action under 42 USC § 1983.

2. Whether a county may be held liable for the unconstitutional act of its judge in setting excessive bail.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. It is attached as an appendix. The opinion below is unreported since it is a mere restatement of the Fifth Circuit rule that a local subdivision cannot be held responsible for the judicial acts of its judge. *Johnson v. Moore*, 952 F. 2d 92 (5th Cir. 1992).

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on September 23, 1994. This Court has jurisdiction to review by Writ of Certiorari under 28 USC § 1254.

FEDERAL STATUTE INVOLVED

The federal statute involved is 42 USC § 1983, which says:

> Every person who, under color of any statute, ordinance, regulation, custom or uses of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, Eloise McGee, filed a 42 USC § 1983 suit in the United States District Court for the Southern District of Mississippi. She alleged that Holmes County, Mississippi is liable to her for damages for the acts of its Justice Court Judge in setting excessive bail. Record at ("R") 1-2, 90-92.

McGee was arrested on December 4, 1991 under a warrant issued by a Holmes County Justice Court Judge. Without making any "meaningful inquiry" into the proper amount of bail, the judge arbitrarily set bail at $50,000. When McGee was finally brought before the Justice Court Judge, twelve days after her arrest, for determination of the proper amount of bail, no bail was required, and she was released on her own recognizance. The criminal charges (child abuse) against her were not pursued. However, McGee was not compensated for the twelve days (December 4 through December 16) she was unconstitutionally held in jail for financial inability to make the excessive bail. R., 90-92.

The proposed Amended Complaint seeks relief against Holmes County, Mississippi for the acts of its Justice Court Judge in setting an excessive bail in violation of U.S. Constitution Amendment Eight. R., 90-91. Excessive bail violates the Eighth Amendment, which permits bail to be set only at such amount as is reasonably calculated to assure appearance at trial. *Stack v. Boyle*, 342 U.S. 1 (1951).

United States District Judge Tom S. Lee dismissed the suit on the grounds that, under *Johnson v. Moore*, 972 F. 2d 92 (5th Cir. 1992), a local political subdivision is not liable for judicial acts of its judge. Based on *Johnson v. Moore*, the Fifth Circuit affirmed.

Believing that *Johnson v. Moore* cannot be reconciled with this Court's precedents, McGee filed this Petition.

ARGUMENT I.

THIS COURT SHOULD REVIEW THIS CASE SINCE THE FIFTH CIRCUIT'S HOLDING IN *JOHNSON V. MOORE*, 952 F. 2D 92 (5TH CIR. 1992), THAT A LOCAL GOVERNMENT IS NOT LIABLE FOR INCONSISTENT BOTH WITH *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986) AND WITH *OWEN V. CITY OF INDEPENDENCE*, 445 U.S. 662 (1980).

Though innocent of any crime, Petitioner McGee was held in jail for 14 days because a Justice Court Judge of Holmes County, Mississippi decided to disregard the United States Constitution Amendment Eight in setting bail. [1] By its terms, 42 USC § 1983 provides a damages remedy for this

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[1] Under Mississippi law, Justice Court Judges (formerly called Justices of the Peace) are granted the final authority to (footnote continued)

violation of constitutional rights. As stated in *Felder v. Casey*, 487 U.S. 131 (1988):

> The central objective of the Reconstruction-Era civil rights statute...is to insure that individuals whose federal constitutional...rights are abridged, may recover damages....

Despite 42 USC § 1983's "central objective" of providing a remedy, the Fifth Circuit has held that McGee has no remedy for being unconstitutionally incarcerated for twelve days. She, of course, cannot sue the judge individually for committing her to jail under an excessive bail since judges are immune, in their individual capacities, for their judicial acts. *Stump v. Sparkman,* 435 U.S. 349 (1978); *Mireles v. Waco*, 502 U.S. ___, 116 L. Ed. 2d 9 (1991). According to the Fifth Circuit, McGee also has no remedy against the County whom the judge represents. The Fifth Circuit rule is that a local government cannot be held liable for the acts of a judge unless the acts are of an "administrative" rather than a "judicial" nature. *Johnson v. Moore*, 952 F. 2d 92 (5th Cir. 1992).[2]

The Fifth Circuit's denying a Plaintiff all remedies when his constitutional rights are violated through the judicial act of a judge cannot be reconciled with *Pembaur.* The question in *Pembaur* was whether a county could be held liable for the

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[1](continued)
set bail for crimes allegedly committed in the counties in which they sit. *Miss. Code Ann.*, § 99-5-11, 99-3-7. They are elected for four year terms, Miss. Constitution, § 171, with the number of judges dependent upon the county's population. *Miss. Code Ann.*, § 99-11-2.

[2]*Johnson v. Moore* held that a municipality cannot be held liable for the unconstitutional acts of a judge in sentencing one to jail without being represented by an attorney, since sentencing is a judicial act.

acts of its county prosecutor. A prosecutor and a judge enjoy the same individual judicial immunity for judicial acts. *Imbler v. Pachtman*, 424 U.S. 409 (1976). But *Pembaur* did not determine the county's liability by deciding whether the prosecutor was carrying out a judicial function. Instead, *Pembaur* held the county's liability depended only upon whether the act in question was that of an official policy-maker who was carrying out a policy decision on behalf of a local government. *Pembaur* inherently rejected the Fifth Circuit's holding in *Johnson v. Moore* that the liability of the county depended upon whether the underlying actor (there, the county prosecutor) was carrying out a "judicial" function. The question, according to *Pembaur,* was whether the decision was made by a person authorized to make policy on behalf of the county. According to *Pembaur:*

> If the decision to adopt that particular course of action is properly made by that government's authorized decision-makers, it surely represents an act of official government policy as that term is commonly understood.

If *Pembaur* be followed, the county must be held liable for the policy acts of the judge in setting an excessive bail. In Mississippi, a Justice Court Judge is vested with the final authority to set bail. *Miss. Code Ann.*, § 99-5-11, 99-3-7. Thus, under *Pembaur,* a county is liable for a final policy decision to set bail in an unconstitutionally excessive amount.

Johnson v. Moore misapplies this Court's precedents. This Court has held that a judge has immunity in his *individual* capacity when his acts are judicial. *Mireles v. Waco*, 502 U.S. ___, 116 L. Ed. 2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978). On the other hand, this Court has squarely held that governmental entities, unlike individuals, enjoy no

immunity of any sort. *Owen v. City of Independence*, 445 U.S. 622 (1980). Since *Owen* decisively holds that governmental entities enjoy no immunities, the Fifth Circuit's holding that the governmental entities have the same judicial immunity as do judges disregards this Court's controlling precedent. *Owen* specifically held that governmental entities do not enjoy an individual officer's immunity, since the effect of such a holding would be that "many victims of the constitutional violations" caused by municipalities would be without remedy. By granting the county immunity simply because the judge would be immune, this Court has "left many victims of constitutional violations...." without a remedy. This result frustrates 42 USC § 1983's "central objective" of providing a remedy.

Respectfully submitted,

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DATED: December 19, 1994

7.

NO.

In The

Supreme Court of the United States

October Term, 1995

ELOISE MCGEE,
Petitioner,

VERSUS

HOLMES COUNTY, MISSISSIPPI
Respondent.

APPENDIX

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December 19, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ELOISE MCGEE — PLAINTIFF

VS. — CIVIL ACTION NO. 3:93-CV-57 (L) (C)

KATHERINE FOSTER and
HOLMES COUNTY, MISSISSIPPI — DEFENDANTS

ORDER

This cause is before the court on the application of plaintiff to review the order entered by the magistrate judge denying plaintiff's motion for leave to amend. By the amendment, plaintiff sought to allege liability on the part of Holmes County for acts taken by a justice court judge of that county. The magistrate judge ruled that amendment would be futile in the light of the Fifth Circuit's holding in *Johnson v. Moore,* 952 F. 2d 92 (5th Cir. 1992). On her application for review, plaintiff has not undertaken to show that the magistrate judge's ruling is either clearly erroneous or contrary to law and the court, therefore, finds that the magistrate judge's ruling should be affirmed.[1] Since the request to amend has been denied, and since the complaint as it now stands states no cause of action, it must be dismissed.

Accordingly, it is ordered that the order of the magistrate judge denying leave to amend is affirmed. It is further

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[1]Plaintiff, in fact, concedes that under *Johnson*, amendment would be futile, and further concedes that this court is bound to follow *Johnson*. She contends, though, that the rule espoused by the Fifth Circuit in *Johnson* is contrary to United States Supreme Court precedent and thus advises that she will raise that issue on an appeal to the Fifth Circuit.

ordered that plaintiff's complaint is dismissed for failure to state a claim upon which relief may be granted.

ORDERED this 6th day of December, 1993.

s/s_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7791
Conference Calendar

ELOISE MCGEE,

Plaintiff-Appellant,

versus

KATHERINE FOSTER ET AL.,

Defendants,

HOLMES COUNTY, MS,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA-3:93-57 (L) (N)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Pursuant to 42 U.S.C. § 1983, Eloise McGee sued Holmes County, Mississippi, alleging that a justice court judge violated state law and McGee's due process rights by setting excessive bail after McGee was arrested for child abuse. McGee sought to amend her complaint to state causes of action under the Eighth and Fourteenth Amendments for denial of due process and excessive bail. The magistrate

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

judge denied the motion to amend as futile, and the district court dismissed McGee's suit for failure to state a claim. McGee challenges the dismissal.

"In reviewing a Rule 12(b) (6) dismissal, this Court accepts all well pleaded arguments as true and views them in the light most favorable to the plaintiff." *Mitchell v. McBryde*, 944 F. 2d 229, 230 (5th Cir. 1991) (internal citations, quotations and alterations omitted). "The dismissal will not be upheld unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation marks and citation omitted).

"In a § 1983 action, a municipality may not be held strictly liable for the acts of its non-policy-making employees under a *respondeant superior* theory." *Benevides v. County of Wilson*, 955 F. 2d 958, 972 (5th Cir.), *cert. denied*, 113 S. Ct. 79 (1992). A local governing body "may be liable under § 1983, however, where the alleged unconstitutional activity is inflicted pursuant to official policy." *Johnson v. Moore*, 958 F. 2d 92, 93 (5th Cir. 1992). Municipal liability under § 1983 also may be predicated upon an isolated decision made by a person with power to make policy for the municipality. *Pembaur v. Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). A § 1983 complaint against a municipality must identify the policy, connect the policy to the municipality, and show that the particular injury occurred because of the execution of the policy. *Bennett v. Slidell*, 728 F. 2d 762, 767 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016 (1985).

McGee relies heavily on *Pembaur*. She argues that a county judge in Mississippi is a county policy-making official and that the county is liable for the judge's isolated deci-

sion to set her bail at $50,000. "[A] municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker." *Johnson*, 958 F. 2d at 94. This Court distinguishes between the judge's administrative actions, which may constitute official county policy, and the judge's judicial actions, wherein the judge effectuates state policy by applying state law. *See id.*

McGee argues that the decision in *Johnson* is contrary to the Supreme Court's decision in *Pembaur*. While some municipal judges may make more policy than others, the pith of McGee's argument is that the county judge violated her rights in implementing the state bail statute. The setting of bail is a judicial duty. *See Thomas v. Sams*, 734 F. 2d 185, 189-90 (5th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). The decision of the district court is AFFIRMED.

JAN 13 1995

No. 94-1125

In The

Supreme Court of the United States

October Term, 1994

ELOISE McGEE,

Petitioner,

v.

HOLMES COUNTY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a Mississippi county may be held liable for a judicial decision of a Justice Court Judge under 42 U.S.C. § 1983?

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No. 94-1125

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FEDERAL STATUTE INVOLVED

The petitioner claims that the federal statute involved is 42 U.S.C. § 1983. This statute is quoted in petitioner's petition for writ of certiorari which was filed with this Court on December 19, 1994. The respondent's position is that the petitioner has not been deprived of any rights, privileges, or immunities secured by the Constitution and laws of the State of Mississippi or the United States as prescribed by said statute. Alternatively, assuming *arguendo* that such deprivation occurred, respondent was not responsible therefor. Therefore,

respondent is not liable to the petitioner under 42 U.S.C. § 1983, or otherwise.

STATEMENT OF THE CASE

Eloise McGee filed a lawsuit against Holmes County, Mississippi, and a Mississippi Department of Human Services employee, claiming civil rights violations under 42 U.S.C. § 1983. Mrs. McGee voluntarily dismissed the Mississippi Department of Human Services employee.

The petitioner was arrested on December 4, 1991, under a warrant issued by Judge Shirley Neal, a Holmes County Justice Court Judge. Holmes County prosecutor, Hon. Buren T. Batson, instituted criminal charges of child abuse against Eloise McGee and her husband, Gregory McGee, in the Justice Court of Holmes County, Mississippi, after a report had been made to him by Katherine Foster of the Mississippi Department of Human Services. Mrs. Foster's report was based on information obtained from the McGee children after they requested a meeting with her. Gregory and Eloise McGee were arrested and charged with five counts of felony child abuse on December 4, 1991. At that time, Mr. McGee and Mrs. McGee received Court-appointed attorneys. Thereafter, the McGees were brought before the Justice Court Judge for a preliminary hearing, where sufficient evidence was presented before Judge Neal to bind them over to the Holmes County Grand Jury, with bond being set for Eloise McGee at $1,000.00, and bond for Gregory McGee being set at $50,000.00.

Mr. McGee was tried in the Circuit Court of Holmes County, Mississippi, and was acquitted. Eloise McGee never stood trial on the four indictments, which were ultimately dismissed by the State of Mississippi.

At no time did Mrs. McGee or her attorney file a *habeas corpus* petition, request a reduction in bond or request a hearing to reduce bond.

The complaint against Holmes County, Mississippi, was filed on February 5, 1993. Thereafter, Eloise McGee sought to amend her complaint but the motion to amend was denied by U. S. Magistrate Judge, the Honorable John R. Countiss, III, and the case was dismissed following *Johnson v. Moore*, 952 F.2d 92 (5th Cir. 1992). United States District Court Judge Tom S. Lee reviewed Judge Countiss' order and dismissed the suit, following *Johnson*. The United States Court of Appeals for the Fifth Circuit affirmed Judge Lee's decision based on a multitude of cases including *Johnson, supra, Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), and *Benevides v. County of Wilson*, 955 F.2d 958 (5th Cir. 1992), cert. denied, 113 S. Ct. 79, 121 L. Ed. 2d 43 (1992).

REASONS FOR DENYING THE WRIT

The United States Supreme Court should not review this case since the Fifth Circuit's holding in *Johnson, supra*, is consistent with this Court's prior decisions.

The petitioner's argument is hardly worthy of a rebuttal. However, since there are numerous misstatements of fact and law, the respondent is compelled to tell the real story.

Eloise McGee, being charged with five separate counts of felony child abuse,[1] was initially held in the Holmes County Jail for fourteen days under a $50,000.00 bond, which amount represents $10,000.00 per count. The Justice Court Judge set the bond at the instant the warrant was signed. Immediately after Mrs. McGee's arrest, she was appointed an attorney, the Honorable Jannie Lewis, to represent her. At no time did Mrs. McGee or her attorney request a bond reduction or institute a *habeas corpus* proceeding, which would have been heard immediately by the Justice Court Judge.[2] Instead, Mrs. McGee stayed in jail until her preliminary hearing, at which time the Justice Court Judge of Holmes County, Mississippi, decided that enough evidence had been presented to bind Mrs. McGee and her husband over to the Holmes County Grand Jury. Mrs. McGee and her husband were later indicted by the Holmes County Grand Jury. The McGees' cases were severed at the instance of their counsel, and Mr. McGee's case was brought to trial first. Mr. McGee was acquitted and therefore Mrs. McGee was never tried.

Mississippi law provides that any Justice Court Judge, Municipal Judge, County Court Judge or Circuit

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[1] Miss. Code Ann. § 97-5-39(2) (1972).

[2] In *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951), the defendants exercised their right for reduction of bail by motion and filed writs of *habeas corpus*. The petitioner here did not invoke these rights and privileges.

Court Judge can set bail. Miss. Code Ann. § 99-5-11 (1972).

The petitioner is correct in saying that the Justice Court Judge cannot individually be sued for his judicial acts. *Mireles v. Waco,* 502 U.S. 1, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991). Clearly, a county cannot be held liable for the acts of a non-policy making employee under a theory of *respondeat superior. Benevides v. County of Wilson, supra; Carbalan v. Vaughan,* 760 F.2d 662 (5th Cir. 1985), cert. denied, 474 U.S. 1007, 106 S. Ct. 529, 88 L. Ed. 2d 461.

This Court has repeatedly held that § 1983 liability cannot be imposed on a governmental entity under a theory of *respondeat superior. Monell v. Department of Social Services,* 436 U.S. 658, 690-694, 98 S. Ct. 2018, 2335-2337, 56 L. Ed. 2d 611 (1978).

A clear reading of *Johnson v. Moore, supra,* shows that it is compatible with *Pembaur.* In fact, in *Bigford v. Taylor,* 834 F.2d 1213 (5th Cir. 1988), cert. denied, 488 U.S. 851, 109 S. Ct. 135, 1026 L. Ed. 2d 108, the Fifth Circuit Court of Appeals, relying on *Pembaur,* stated as follows:

> A Texas County Judge may possess such policy making authority in some matters. . . . However, (Judge Buckner) was not the Galveston County Judge, but a Justice of the Peace for one precinct of the county. His job is to adjudicate various small claims. . . . and it does not involve any of the policy making functions of the county judge.

Id. at 1222.

The same can be said for Judge Neal. He is a Justice Court Judge, which is a form of magistrate. His duties are to adjudicate claims under $1,000.00, to hear misdemeanor criminal matters (those constituting imprisonment up to one year) and to set bond for those persons charged by affidavits with crimes and offenses.

Mrs. McGee asks this Court to read *Pembaur* to support her argument that a Justice Court Judge is a final policy maker for Holmes County, and that his actions constitute official policy. That argument is meritless. A Justice Court Judge exercising his or her judicial discretion does not make official county policy, but merely uses the discretion provided to him or her by the laws and statutes of the State of Mississippi. *Id.* at 1222.

Furthermore, the Mississippi Legislature enacted a statute to prohibit such suits against governmental entities. Mississippi Code Annotated, § 11-46-9 (1972) states in part:

> "A governmental entity[3] and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (a) arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature; . . . "

Therefore, under existing State law, Holmes County is not liable for the acts or omissions of a judicial nature.

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[3] The term includes state and political subdivisions like Holmes County.

To grant this petition in this case would send a clear signal to trial judges that their judicial acts, even those of a discretionary nature, could bind a political subdivision in every situation. The result would be to open a "Pandora's Box" of litigation against municipalities, counties and states every time a judge makes a decision. Surely, that is not what 42 U.S.C. § 1983 was meant to do.

CONCLUSION

For the foregoing reasons, and based on the authorities cited, the petition for writ of certiorari should be denied.

Respectfully submitted,

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